Supreme Court, U. S.
FILED
MAR 7 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-1367

GEORGIENA N. COOK,
Petitioner,

vs.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

This is a "second" petition for writ of certiorari because of the prior determination of the Court in No. 77-1599, announced October 2, 1978, reported as *Cook v. Muskingum Watershed Conservancy District* (Mem.), 437 U.S. ....., 99 S. Ct. 68, 58 L. Ed. 2d 102. This decision is reproduced *infra*, pages 11-12.

OPINIONS BELOW

The reinstated first order by the court of appeals, on December 19, 1977, is reproduced in the Appendix hereto. This previously vacated order is reported only as a decision without published opinion at 573 F.2d 1310.

The second order by the court of appeals, filed November 27, 1978, is reproduced in the Appendix hereto and is unreported. The order that a petition for rehearing with a request for rehearing en banc be denied, filed January 2, 1979, is reproduced in the Appendix hereto.

The only order of the district court, and the judgment entry, both filed November 30, 1976, effectively treating respondent's motion to dismiss as one for summary judgment and granting the same, remains as unreported. Both are reproduced in the Appendix hereto.

JURISDICTION

This petition was filed within ninety (90) days of the order denying petitioner's timely filed petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Will the district court be directed to conduct a trial on the merits, after a determination of class certification and after discovery proceedings, of petitioner's allegations that an Ohio conservancy district violated both her procedural and substantive due process rights as well as those of class members whom she seeks to represent?

II. Will the federal law provide Fourteenth Amendment protection against State actions in a controversy involving a permanent leasehold interest, an estate less than freehold and not in fee simple absolute, if such State actions can be proven to be "arbitrary, capricious and unreasonable"?

CONSTITUTIONAL PROVISIONS, STATUTES AND PROCEDURAL RULES INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> ". . . nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Bill of Rights, Article V, provides:

> ". . . nor shall private property be taken for public use, without just compensation."

26 U.S.C. §1055 provides:

(a) Character.—For purposes of this subtitle—

(1) a redeemable ground rent shall be treated as being in the nature of a mortgage, and

(2) real property held subject to liabilities under a redeemable ground rent shall be treated as held subject to liabilities under a mortgage.

. . .

(c) Redeemable ground rent defined.—For purposes of this subtitle, the term "redeemable ground rent" means only a ground rent with respect to which—

(1) there is a lease of land which is assignable by the lessee without the consent of the lessor and which (together with periods for which the lease may be renewed at the option of the lessee) is for a term in excess of 15 years,

(2) the leaseholder has a present or future right to terminate, and to acquire the entire interest of the

lessor in the land, by payment of a determined or determinable amount, which right exists by virtue of State or local law and not because of any private agreement or privately created condition, and

(3) the lessor's interest in the land is primarily a security interest to protect the rental payments to which the lessor is entitled under the lease.

28 U.S.C. §1254(1) provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil . . . case."

28 U.S.C. §2201 provides:

"In a case of actual controversy within its jurisdiction, . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. §2202 provides:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

28 U.S.C. §1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, ..."

42 U.S.C. §1983, enacted as §1 of the Civil Rights Act of 1871, 17 Stat. 13, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 1, Federal Rules of Civil Procedure, provides:

"These rules govern the procedures in the United States District Courts in all suits of a civil nature . . . in equity . . . . They shall be construed to secure the just, speedy and inexpensive determination of every action."

Rule 12, Federal Rules of Civil Procedure, provides:

(a) A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, ...

. . .

(b) Every defense, in law or fact, to a claim for relief in any pleading, . . . , shall be asserted in the responsive pleading thereto . . ., except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . ., (6) failure to state a claim upon which relief can be granted, ... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 23, Federal Rules of Civil Procedure, provides:

"...

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole, ..."

Rule 57, Federal Rules of Civil Procedure, provides:

"The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. §2201, shall be in

accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Rule 14, United States Court of Appeals for the Sixth Circuit, provides:

". . .

(b) Required Statement for Rehearing En Banc. . . . the petition shall contain on the first page of the petition, one or both of the following statements of counsel as applicable:

* * * * *

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Sixth Circuit, [or the Supreme Court of the United States] and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: [citing specifically the case or cases].

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: . . ."

The caption to Section 2105.04, Ohio Revised Code, reads:

"Permanent leases to descend same as estates in fee."

Section 6101.15, Ohio Revised Code, provides:

"In order to accomplish the purposes of the conservancy district, the board of directors of a conservancy district may:

. . . .

(K) Hold, encumber, control . . . lease . . . and sell real and personal property. . . ."

Section 6101.44, Ohio Revised Code, provides:

"The moneys of every conservancy district shall be administered through the following funds:

(A) The 'preliminary fund', . . .;

(B) The 'improvement fund', . . .;

(C) The 'bond retirement fund', . . .;

(D) The 'maintenance fund', ..."

STATEMENT OF THE CASE

Petitioner filed suit in the federal district court on September 24, 1976, against respondent under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, charging that her interest in property has been adversely affected in violation of the Fourteenth Amendment and seeking declaratory and injunctive relief under 28 U.S.C. §2201.

The merit allegations in the complaint read—

"FIRST CLAIM

9. The action of the Board of Directors of the Defendant, as 'Lessor', raising and increasing the annual ground rent for Lot A-431, Arrowhead Allotment on Atwood Lake, Carroll County, Ohio, from $131 to $294 (an increase of about 225%), is an arbitrary, capricious and unreasonable exercise of their authority, causing injury and damage to the Plaintiff and risk of forfeiture of rights in property, both personal and real, by the Plaintiff, contrary to the United States Constitution, Amendment XIV §1 and 42 U.S.C. §1983."

The respondent is a conservancy district, a body corporate and political subdivision of the State of Ohio, with a statutory authorization to lease and sell real and personal property.[1]

The controversy involves a parcel of a tract of unimproved farm land acquired by respondent. A common law estate, less than freehold and not in fee simple absolute, in the parcel of land was conveyed to petitioner by an agreement on September 1, 1962. Soon thereafter, petitioner caused to be drilled the first proven and working water well on the western end of the tract. In the fall of 1964, petitioner caused to be erected on the parcel a permanent, year round, two story dwelling.

Petitioner paid $110 annually for the first seven years as ground rent. Thereafter, the amount was gradually raised until it reached $131 by the 14th year.

The respondent, through its agent, informed petitioner in a letter dated August 27, 1976:

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1. Section 6101.15, Ohio Revised Code. The Court has dealt with the organization of an Ohio conservancy district before. See, *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*, 429 U.S. 651, 97 S. Ct. 828, 51 L. Ed. 2d 116 (1977).

"Dear Mrs. Cook:

As you no doubt realize, your lease on lot A-431 at Atwood Lake expires September 1, 1976. The District reviewed all of the rental rates during 1974, and directed that adjustments be made on all leases entered into or renewed after January 1, 1975. The adjustments reflect increased values within cottage site areas and additional District operating costs. It was determined that these new adjustments were essential to maintain established standards.

The Board of Directors has authorized renewal of this lease at an annual rental of $294.00. This amount will be changed each year in strict accordance with the BLS Cost of Living Index as provided in paragraph (3) of section III of your lease.[2] Please read your lease thoroughly.

Will you please sign both copies where indicated, being sure to have two witnesses sign opposite, and return them to me by September 8 along with your check in the amount of $294.00 to cover the first year's rental under the new lease."

The complaint was dismissed on respondent's motion, before answer, November 30, 1976. The appeal was promptly noticed and duly briefed. The certified record comprised 66 pages.

The order of a panel of the Sixth Circuit Court of Appeals finding the "appeal to be completely frivolous" was filed December 19, 1977. A petition for rehearing

2. The rental payment asked by respondent for the year beginning September 1, 1977, was $309; an increase of 5.1%. Assuming only a 5% per year increase, by the end of the next 14-year term or period respondent could be asking petitioner to pay $582 per year (calculated using a 5% 14-year compound interest standard factor of 1.9799).

with a request for rehearing en banc was denied February 15, 1978.

A paid petition for writ of certiorari under 28 U.S.C. §1254(1) was docketed in this Court on May 10, 1978, as No. 77-1599.

As recently stated by Mr. Justice White, during the week of September 25, 1978, the Court met in Conference to deal with 992 items that had accumulated and had been studied during the summer. There were 865 petitions for writs of certiorari. Summary action on the merits was taken on 15 petitions for certiorari.[3]

This case was one of the 15.

On the first Monday of October, the Memorandum decision in *Georgiena N. Cook v. Muskingum Watershed Conservancy District*, 437 U.S. ....., 99 S. Ct. 68, 58 L. Ed. 2d 102 said:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Monell v. Department of Social Services of New York City*, 436 U.S. ..... (1978)."[4]

The mandate of the Court issued October 31. Within a month, the same panel of the appellate court responded:

(November 27, 1978)

"Before: EDWARDS and CELEBREZZE, Circuit Judges, and PECK, Senior Circuit Judge.

3. *Brown Transport Corp. v. Atcon, Inc.*, 437 U.S. ....., 99 S. Ct. 626, 58 L. Ed. 2d 687.

4. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

"In an order dated December 19, 1977, this court affirmed the judgment of the district court dismissing plaintiff's complaint. Plaintiff petitioned the Supreme Court for a writ of certiorari and the Supreme Court, in response thereto, vacated the judgment of this court and remanded the cause to this court 'for further consideration in light of *Monnell* [*sic*] *v. Department of Social Services of New York City*, 436 U.S. ..... (1978).' ..... U.S. ..... 1978, 47 U.S.L.W. 3220.

"The district court dismissed the complaint on the grounds that the defendant was not a 'person' in terms of 42 U.S.C. § 1983 and that the complaint did not state a claim for relief under § 1983. Our affirmance found the 'appeal to be completely frivolous.'

"While Monnell [sic] now casts some doubt upon the district court's holding that defendant was not a 'person' in terms of § 1983, it has no effect on whether or not the complaint stated a claim for relief under § 1983. We are of the opinion, as we previously held, that plaintiff's assertions in that regard are completely frivolous.

"It is therefore ordered that the judgment of the district court be, and it hereby is, affirmed; and the prior judgment of this court is hereby reinstated.

"Costs taxed to plaintiff.

Entered by Order of the Court
/s/ John P. Hehman
Clerk"

The panel of the court of appeals did not call for briefs or oral argument before quickly undoing what this Court had done. Petitioner's first opportunity to argue the issues after remand was the filing of a petition for rehearing and suggestion for rehearing en banc. The required Rule 14 jurisdictional statement read:[5]

> "I express a belief, based on a reasoned and studied professional judgment, that the panel decision on November 27, 1978, is contrary to the decision of the Supreme Court of the United States in *Cook v. Muskingum Watershed Conservancy District*, ... U.S. ....., 99 S. Ct. 68 (October 2, 1978) and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: See, *Gordon v. Warren*, 579 F.2d 386 (June 26, 1978, Weick, Edwards and Lively, Circuit Judges).
>
> "I further express a belief, again based on a reasoned and studied professional judgment, that this appeal still involves several questions of exceptional importance; . . . [four questions were presented]."

The rehearing brief filed December 6, 1978, included: a verbatim reproduction of Questions I, II and III as presented to this Court by the petition of May 10 in No. 77-1599; an argument that "sometime between May 10 and October 2, 1978, . . . justices of the Supreme Court read, understood, and answered in the affirmative as to the three questions presented in the petition for certiorari;" a verbatim reproduction of pages 27 through 31 of the petition of May 10 going to the property interest issue; and, arguments on the four "questions of exceptional importance."

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5. Rule 14, U. S. Ct. App. 6th Cir., 28 U.S.C.A.

Denial of the rehearing petition January 2, 1979, may be construed as meaning that in the states comprising the Sixth Circuit a property interest which is conveyable, improvable, taxable, inheritable and valuable is not Constitutionally protectable.

ARGUMENTS

Question I

It has just recently been said that "whenever this Court grants certiorari and vacates a Court of Appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits." *Board of Trustees of Keene St. Col. v. Sweeney*, 437 U.S. ....., 99 S.Ct. 295, 296, 58 L. Ed. 2d 218, 219 (1978).

The first petition in No. 77-1599 was before this Court from mid-May until the first Monday in October. The attention of the Court was focused on three separate but interrelated questions having a genesis in: the prior to 1976 acts of petitioner and respondent; the dispositive actions of the two courts below as to the 1976 complaint; the jurisdictional statutes, 42 U.S.C. §1983 and 28 U.S.C. §1343; the relief statute, 28 U.S.C. §2201; and, the United States Constitution, Amendment XIV §1.

Question I went to an alleged deprivation of procedural due process. Question II raised the §1983 subject matter jurisdiction issue. Question III spoke to the merits of petitioner's constitutionally protectable property right under Ohio law and deprivation of substantive due process.

Until this Court shall rule or imply otherwise, petitioner's counsel will continue to believe that it was not the

intention of the Court to expend its most precious asset, the time and judgment of its members, in a vain act.

The panel of the Sixth Circuit has twice demonstrated that it feels no obligation to proclaim the federal law for its jurisdiction in an actual controversy involving Constitutional rights claimed by petitioner versus contract rights claimed by an Ohio conservancy district. Neither abbreviated judgment of the Court of Appeals contains a coherent recitation of controversial facts as alleged in the complaint or as developed by the motion papers. The November 27 judgment makes only a token reference to the October 2 decision of this Court.

While the panel for petitioner's appeal concedes only that "Monnell [sic] now casts some doubt upon the district court's holding that defendant was not a 'person' in terms of §1983," earlier, another panel of the same court did express an understanding of what the Court was saying in *Monell, supra.* That panel ordered: "The district court should re-examine the § 1983 claims against the city in light of this holding [Monell]." *Gordon v. City of Warren*, 579 F.2d 386, 392 (6th Cir. June, 1978).[6]

On several occasions since filing of the complaint in September of 1976, friends and colleagues have asked of petitioner's counsel, "Why go on with this case?" Using the words of Rule 14 of the Sixth Circuit, "based on a reasoned and studied professional judgment," there are at least three cognizable factors. First, an "abuse of rights" or an "abusive use of rights" by an entity such as respondent having state governmental power can be effectively

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6. Respondent's counsel may be heard to argue that plaintiffs in *Gordon* did "own" the real estate in issue. Petitioner responds that this is a distinction without a difference. Petitioner's argument that a "fee simple absolute" should not be a requirement for a Section 1983 claim for relief begins *infra*, page 17, as the argument on Question II.

curbed only by and within the federal court system. Second, the *pro bono publico* factors: a more direct accountability of the *real persons* managing the *real estate* business of an Ohio conservancy district to its *real owners,* the citizens of Ohio; as well as the by now rather significant moral obligation to friends and neighbors similarly situate in dwellings on land "legally owned" by respondent. The third factor is admittedly subjective: to determine irrevocably what are (or what were) petitioner's Constitutionally protected rights in her property on Atwood Lake.

At this point in time, the salient fact is that after remand from the Court, a panel of the Sixth Circuit Court of Appeals has dogmatically reinstated the vacated decision that petitioner's cause is not justiciable. We respectfully plead to the Court "for an exercise of this Court's power of supervision" to grant petitioner her trial on the merits of this case.

We further submit that an answer favoring petitioner and granting her the trial is entirely consistent with a conclusion reached for at least the majority in *Hagans v. Lavine,* 415 U.S. 258, 94 S. Ct. 1372, 39 L. Ed. 2d 557 (1974).

> ". . . We think the admonition of Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), should be followed here:
>
> > Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. . . . *Id.*, at 542, 94 S.Ct. at 1381-1382."

An affirmative answer to Question I will show clearly to the panel of the court of appeals that this case has now been twice "reviewed" pursuant to 28 U.S.C. §1254(1) for special and important reasons.

Question II

There are but four documentary exhibits in the present record. Respondent has offered: the original agreement of 1st September, 1962 (Exhibit A); the renewal agreement of 1st September, 1976 (Exhibit B); a tabulation of all agreements as of October 7, 1976 (Exhibit C). Petitioner has offered the *causa causans* letter of August 27, 1976, from respondent's agent. (Exhibit 1, A12)

Before 1962, respondent acquired a "fee simple" title to a tract of unimproved farm land next to a Corps of Engineers' lake (built and maintained at no cost to respondent). Thereafter, the tract was divided into parcels for providing unimproved building sites near the lake.

On 1st September, 1962, the parties executed the original agreement, printed and of standard form, and styled as "THIS INDENTURE." Thereby, the respondent conveyed and the petitioner became vested with some form of property right or interest in a parcel of the tract, according to Ohio law. Thereafter, with reliance upon her "re-

newable forever" property right or interest, petitioner met the affirmative covenants of the agreement and made substantial financial investments to permanently increase the value of the parcel of land.

In ensuing years, petitioner further increased both the value of the tract and of her parcel, along with her neighbors, by paying county and township taxes, building and operating a sanitary sewer system, and improving and maintaining the access road.

Sometime in 1974, the respondent "reviewed all of the rental rates . . . , and directed that adjustments be made on all leases entered into or renewed after January 1, 1975. The adjustments reflect increased values within cottage site areas and additional District operating costs. It was determined that these new adjustments were essential to maintain established standards."[7] (Exhibit 1, A12)

Petitioner was a "pioneer" in respondent's tract, so she was one of the first to hear about the 1974 determination to increase the yearly payment by a factor of 1.25. Petitioner had not been told about the 1974 review; she was told nothing in 1975; she was told in 1976, with a twelve-day deadline, that the 1974 decision was being strictly enforced. As argued in the first petition in No. 77-1599 (p. 20): "This course of conduct can only be classified as an absolute deprivation of procedural due process by an Ohio conservancy district."[8]

7. Factually, "increased values within cottage site areas" do exist but originate with petitioner and the other parcel holders. Respondent can offer no persuasive evidence or testimony that it has contributed an iota to these increased values.

8. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1967).

Further sustenance for the deprivation of procedural due process conclusion in No. 77-1599 was found in a trilogy of very recent procedural due process decisions by the Court: *Board of Curators of University of Mo. v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978); *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); and, *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

From *Carey v. Piphus, supra*, we attributed great significance to the proclamation that "a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him [or her] fairly, as well as to minimize the risk of mistaken deprivations of protected interests."[9] (435 U.S. 262, 98 S. Ct. 1051)

When petitioner was given actual notice of the dollar amount deemed necessary by respondent as her assessment "to maintain established standards," her Hobson's choice, "either pay the increased rental or lose your house after September 30," was temporarily delayed by the complaint filed in the district court.

Respondent's conduct involved both unilateral executive action and economic coercion. As stated in the first petition in No. 77-1599—

> "The 'unilateral executive action' goes to a procedural due process issue—the 'way respondent did it'—involving the actions beginning in 1974 and not announced to petitioner until August 27, 1976. The quoted phrase 'economic coercion,' not in the com-

9. *"Carey* makes clear that a deprivation of procedural due process is an independent constitutional tort, actionable under §1983 with or without proof of actual injury." *Burt v. Abel*, 585 F.2d 613, 616 (4th Cir. 1978); *accord, Gordon v. City of Warren*, 579 F.2d 386, 391 (6th Cir. 1978).

plaint, has it genesis in a finding by the district court reading—

> 'Careful analysis reveals that plaintiff's primary claim is that her freedom of choosing between economic alternatives is being unreasonably impaired. While Ohio law provides contractual and/or tortious remedies for such an impairment, it does not guarantee freedom from economic coercion.'
>
> Whether 'Ohio law . . . does not guarantee freedom from economic coercion' is not considered as being critical to petitioner's plea. The question at issue is whether the federal law, the Constitution, does guarantee freedom from economic coercion by respondent. On basics, this appears as a question involving both procedural *and* substantive due process—the 'what respondent did' and the 'way respondent did it' issues." (p. 28)

The issue now raised by Question II involving the real property law of Ohio was embodied in Question III in No. 77-1599. As defined in Question III(b), at page 3 of the first petition—

> ". . . such controversy arises from a contract relating to a building site 'owned' by the Ohio conservancy district, but claimed by petitioner as a 'permanent leasehold interest' created by annual payments of 'ground rent' and by a 'first preferential right and option' to renew in 14-year increments."

It was previously presented to the Court (first petition, p. 30) that it is the law of Ohio that payment of an annual or periodic ground rent is to be construed as an attribute of a permanent leasehold or vested property

right. Therefore, we reassert the issue of an inconsistency between the two findings by the district court that petitioner was paying "ground rent" and the Rule 12(b)(6) determination that petitioner had no property right or interest protected by the Fourteenth Amendment. We still rely on OHIO JURISPRUDENCE, 20 O. JUR. 2d, *Estates*, page 295:

> "A ground rent proper is a rent reserved by one who conveys land to another in fee simple. In the absence of any statute affecting the common-law status of a conveyance in fee of land to one, with reservation of ground rent to the other, it has been said that each party is the owner of a fee simple estate; *the grantee's estate being a corporeal inheritance in fee in the land out of which the rent issues*, and the grantor's estate being an incorporeal inheritance in fee in the rent reserved." [Emphasis added]

Respondent's counsel have never countered petitioner's reliance on this authority by identifying an Ohio statute "affecting the common-law status of a conveyance in fee of land to one, with reservation of ground rent to the other."[10]

According to relevant Ohio law, the estate claimed by petitioner is less than freehold. Estates less than freehold are tenancy for years, tenancy from period to period, tenancy by sufferance, and tenancy at will.

The district court said that the indenture of September 1, 1962, is ". . . an agreement with the District leas-

---

10. At trial, petitioner's counsel would offer evidence as to the probate of certain estates which involved property held by decedents pursuant to the same standard form agreement as Exhibit A. These estates went through probate according to Ohio Revised Code, Section 2105.04 which provides that permanent leasehold estates are to descend the same as estates in fee.

ing a certain lot for one year . . . , said agreement provided that plaintiff could renew said lease for fourteen consecutive years. It further provided at the end of said period, [petitioner] had the 'first preferential right and option' to enter a new lease agreement." The district court attributed no legal significance to the clause in the agreement of 1 September 1962 which further states, *the Lessee shall have the right to similarly enter into a new lease agreement at the end of each subsequent 14-year period* [i. e., the agreement is renewable forever]. [Exhibit A, §III(2)].

An accepted authority on property law is McDERMOTT, OHIO REAL PROPERTY LAW AND PRACTICE, 3rd ed. (1966). Therein we find this definition of *tenancy for years*—

> "A tenancy for years is one in which the term is fixed in units of a year or multiples or divisions thereof; it may be for any period which is fixed or computable when the right to present possession accrues. Lodgers, licensees, croppers, employees, and vendors in possession are normally not tenants for years." McDERMOTT, *supra*, §18-11B, Vol. 3, p. 5.

A fair reading of Exhibit A demonstrates a likelihood that respondent had created and petitioner had accepted a tenancy for years in 14-year increments; in perpetuity and forever (at least until the lake silts up or the dwelling falls down).

If respondent should offer some evidence at trial rebutting the tenancy for years theory, or law such as the "Rule against perpetuities," the definition of the "next best" estate avails to the legal benefit of petitioner.

> "A *tenancy from period to period* is one which will continue for successive periods until terminated at the end of a period upon notice by one party to the other. It may be from year to year, month to month, or other period according to the period for which the rent is reserved.
>
> The tenancy usually arises under a lease for an indefinite time with reservation of rent for the period. It may arise where a tenant holds over with the landlord's consent, where a tenancy at will is converted to such by the regular payment of rent, where a lease violates the statute of frauds, or where there is express provision therefor. *An estate from period to period is governed by the same rules as an estate for years except as to termination.* The provisions of the original lease or the permissible provisions of the invalid lease are usually controlling." [Emphasis added]. McDERMOTT, *supra*, §18-11C, Vol. 3, p. 5.

In this case, petitioner's counsel can foresee no mixture of evidence or rule of law that would lower petitioner's estate to a mere *tenancy by sufferance*—meaning "one in which the tenant wrongfully continues in possession without claim of superior title after having been rightfully in possession." McDERMOTT, *supra*, §18-11D, Vol. 3, p. 6.

The lowest estate that can be created by the common law of landlord and tenant is that of *tenancy at will.* Even the most severe critic of petitioner's maintenance of this case could not find his way clear to conclude that petitioner is "[a] person who enters on land by permission of the owner for an indefinite period and without the reservation of any rent [and] is [therefore] a tenant at will by implication." McDERMOTT, *supra*, §18-11E, Vol. 3, p. 6.

Continued perusal of McDERMOTT, *supra*, provides another definition, equally favorable to petitioner, of "ground rent" according to Ohio law—

> "Ground rent is a perpetual rent reserved to the grantor and his heirs out of land which is conveyed in fee simple. It has the characteristics of a fee simple and is held to be real estate. The term 'ground rent' is sometimes applied to leases renewable forever. The covenant to pay rent usually runs with the land so as to make the grantee of the land personally liable to the heirs or devisees of the reversioner." (§18-12B, Vol. 3, p. 8).

The term *ground rent* is not unique to the real property law of Ohio; the term is not merely something to be learned in a first year law school course on real property and then forgotten. At least in the federal law, the generic term *ground rent is alive and well.*[11]

Congress added Pub. L. 88-9, §1(b), Apr. 10, 1963, 77 Stat. 7, 26 U.S.C. §1055 to the 1954 Internal Revenue Act to define the tax aspects of a real property interest designated as a *redeemable ground rent.* Reading of this statute indicates that Congress intended to treat annual rental payments by a leaseholder to a lessor "as being in the nature of a mortgage," at least under certain conditions. Although the full implication of §1055, *supra,* is best left for consideration another day, in another forum, on another record, we respectfully emphasize that a federal species of ground rent can be created by a combination of factors including the relatively short term of 15 years. We emphasize that the time test includes the "periods for which the lease may be renewed at the option of the lessee." §1055(c)(1), *supra.* We further emphasize that a complete record in this case could prove that "the [respondent's] interest in the land is primarily a security

11. Cf., ". . . the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke." Mr. Justice Holmes' dictum in *Gardiner v. William S. Butler & Co.,* 254 U.S. 603, 605 (1918).

interest to protect the rental payments to which the [respondent] is entitled under the lease." §1055(c)(3), *supra.*

We can see no possible reason for construing the Fourteenth Amendment usage of the term *property* to include only a parcel of land held in fee simple absolute and therefore bar any other type of interest being asserted in a §1983 action. If there is no such reason in the federal law, the determinative authority of the Court could remove the Rule 12(b)(6) immunity granted to an Ohio conservancy district by the outstanding federal court judgments in the Sixth Circuit against "enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken v. Bradley,* 433 U.S. 267, 291, 97 S. Ct. 2749, 2762, 53 L. Ed. 2d 745 (1977).

Argument As to Subsidiary Questions Involving the Proposed Class Members

Exhibit C lists the "number of existing cottage site leases on district reservoirs by year of lease execution."

The complaint filed September 24, 1976, included—

> "CLASS ACTION ALLEGATIONS
>
> 12. The FIRST CLAIM is also brought as a class action under Rule 23(b)(2), Fed. R. Civ. P., on behalf of members of a class or sub-classes meeting the following qualifications:
>
> (a) became a 'Lessee' of a Lot in Arrowhead Allotment on Atwood Lake, Carroll County, Ohio, during the year 1962 or at any time prior to the year 1970; or,
>
> (b) became a 'Lessee' of a Lot in any other allotment or premises on Atwood Lake, Carroll County, Ohio, wherein the Defendant was

'Lessor', during the year 1962 or at any time prior to the year 1970; or,

(c) became a 'Lessee' of a Lot in any other allotment or premises on any other lake in the State of Ohio, wherein the Defendant was 'Lessor', during the year 1962 or at any time prior to the year 1970; or, if not otherwise qualified,

(d) was a 'Lessee' of a Lot in any allotment or premises on any lake in the State of Ohio, wherein the Defendant was 'Lessor', and whose rental rate was reviewed during 1974, and thereafter such reviewed rental rate was determined to be the subject of an adjustment if renewed after January 1, 1975.

13. The FIRST CLAIM is also brought as a class action under Rule 23(b)(2), Fed. R. Civ. P., on behalf of the class of 'Lessees' of any Lot or premises, wherein the Defendant is 'Lessor', and who will be affected or benefited by any final injunctive relief or corresponding declaratory relief sought by Plaintiff with respect to Defendant."

The real numbers in this case are, using the respondent's data in Exhibit C: for the proposed ¶12(a) and (b) class, one hundred forty-one (141); for the proposed ¶12(c) class, two hundred sixty-four (264); and, for the combined groups in the proposed ¶12(d) class, four hundred five (405).

Without an affirmative answer by the Court to the Questions I or II of this petition, the decisional law of this case will be as twice determined by a panel of the Sixth Circuit Court of Appeals. Should one or more proposed class members, "the others," seek to litigate a claim for a constitutionally protectable property interest, will

the respondent have available the defenses of collateral estoppel or the related doctrine of res judicata? Could a trial court, federal or state, rely upon the very recent decision by the Court in *Parklane Hosiery Co., Inc. v. Shore*, 437 U.S. ....., 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) and summarily determine that new plaintiffs protesting the actions of respondent in enforcing the 1974 unilateral executive action by "economic coercion" had received a "full and fair opportunity to litigate their claims in the *Cook* case?"

The district court dismissed on two grounds moved by respondent: Fed. R. Civ. P. 12(b)(1), lack of jurisdiction over the subject matter; and 12(b)(6), failure to state a claim upon which relief can be granted. A recent decision by the Fifth Circuit, *Hitt v. City of Pasadena*, 561 F.2d 606 (1977), reviewed a district court's order of dismissal based both on want of federal jurisdiction and failure to state a claim. The *per curiam* opinion in *Hitt* says at page 608—

> "The district court's order dismissing the case was apparently based both on want of federal jurisdiction as well as on failure to state a claim on which relief could be granted. Ordinarily, where both these grounds for dismissal apply, the court should dismiss only on the jurisdictional ground under Fed.R.Civ.P. 12(b)(1), without reaching the question of failure to state a claim under Fed.R.Civ.P. 12(b)(6). *C. Wright & A. Miller, Federal Practice and Procedure: Civil §1350* (1971). Dismissal with prejudice for failure to state a claim is a decision on the merits and essentially ends the plaintiff's lawsuit, whereas a dismissal on jurisdictional grounds alone is not on the merits and permits the plaintiff to pursue his claim in the same or in another forum."

Through its Order of November 27, 1978, the panel of the Sixth Circuit has "fallen back on" or "dropped

down to" an affirmance of the Rule 12(b)(6) issue. This action is contrary to and in conflict with the decision by the Fifth Circuit Court of Appeals in *Hitt v. City of Pasadena, supra.*

CONCLUSION

The constitutional and federal law issues in this matter are not moot. There remains a "case or controversy" which can and should be settled within the federal court system. In *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1911), the Court articulated an often repeated principle of law: that a case will not be moot if the issue is "capable of repetition, yet evading review." (219 U.S. at 515, 31 S. Ct. at 283).

Each September 1, since 1976, another "annual rental" payment has come due. Each year the controversial base rental of $294 has been escalated (the payment due September 1, 1978, was $329). It is predictable that until such time as a district court enters a final order declaring—

b) a fair and reasonable annual ground rent for a Lot or premises, wherein the Defendant is "Lessor"; and further ordering,—

c) that the Defendant refund or credit to the account of Plaintiff the amount of any sum previously paid, as "Lessee", to Defendant, as "Lessor", which is found to be in excess of a fair and reasonable annual ground rent, with interest thereon;[12] [and]

12. In the days following receipt of respondent's letter of August 27, 1976 (Exhibit 1, *supra,* pages 10-11; *infra,* A12), petitioner's counsel considered the rule of federal law that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan,* 415 U.S. 651, 663, 94 S. Ct. 1347, 1356, 39 L. Ed. 2d 662 (1974). Because of this

(*Continued on following page*)

d) that the Defendant tender to Plaintiff a new lease, effective September 1, 1976, setting forth and requiring payment of a fair and reasonable annual ground rent;" (Complaint, Prayer, pp. 4 and 5),

the respondent will rigidly require petitioner and the others to pay the increased assessment by "economic coercion."[13]

This case deserves decision by this Court. Granting of certiorari a second time would be not a matter of favor but of sound judicial discretion. The four documentary exhibits in the present record, the statutory and common law of Ohio, and the precedent of Amendment XIV §1 and 42 U.S.C. §1983 decisions announced by the Court both before and since filing of the complaint, are sufficient for definition of a constitutional doctrine reflecting an "accommodation of competing interests." *Hicks v. Miranda,* 422 U.S. 332, 358, 95 S. Ct. 2281, 2296, 45 L. Ed. 2d 223 (1975).

A review by the Court of the questions presented, following by summary decision or plenary consideration, will determine the priority or proper balance between contract rights rigidly asserted for a business purpose interest by a government entity, such as respondent, and constitu-

Footnote continued—
rule, the monetary aspect of the petitioner's prayer for relief was carefully restricted to request an *order for restitution,* a classic remedy for a Section 1983 "suit in equity." Petitioner's counsel further consulted the enabling statute creating the respondent and noted Section 6101.44, Ohio Revised Code, calling for the establishment of "conservancy district funds" separate and distinct from "public funds in the state treasury." Petitioner's counsel then concluded, and now asserts to the Court, that the rationale of the majority in *Edelman v. Jordan,* should not bar an equitable form of monetary relief if awarded against the respondent.

13. Using the data on Exhibit C, during 1977 and 1978 another 102 property holders will have been presented with the controversial increased assessment by respondent. This year, there will be 68 leases ending the first 14-year term or period.

tional rights claimed by a citizen, such as petitioner, to protect a property interest against arbitrary, capricious and unreasonable actions by respondent.

An affirmative answer to Question I, with a conforming mandate, would permit a trial in the district court to determine the factual and evidentiary issue: a fair and reasonable annual ground rent for a parcel in a tract of respondent's land, with or without an additive factor for economic inflation.

Should the Court determine the answer to Question II in the affirmative, the district judge should not be unduly concerned with constitutional or federal law issues. Should the Court further determine that now is the time for another definition of the constitutional term "property," that decision will provide immediate and authoritative guidance to a complex society wherein state government entities, alone or with federal subsidy, are now in the business of "leasing" land for construction of privately owned housing.[14]

For these reasons, a second Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, which was filed November 27, 1978.

Respectfully submitted,

MACK D. COOK, II
900 First National Tower
Akron, Ohio 44308
(216) 376-1005
Attorney for Petitioner

14. Cf. ". . . judicial construction of the words 'life, liberty or property' is not simply a matter of applying the precepts of logic to accepted premises. Rather, it is experience and judgment that have breathed life into the Court's process of constitutional adjudication." *Leis v. Flynt*, ... U.S. ....., 99 S. Ct. 698, 708, 58 L. Ed. 2d 717, 731 (1979).

APPENDIX

ORDER OF THE DISTRICT COURT

(Filed November 30, 1976)

Civil Action C 76-300 A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGIENA N. COOK,
Plaintiff,

v.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Defendant.

ORDER

Defendant Muskingum Watershed Conservancy District (hereinafter District) has moved the Court to dismiss this action. Upon consideration and for the reasons stated below, said motion shall be granted.

Invoking the Court's jurisdiction under 28 U.S.C. §1343, plaintiff initiated this class action for declaratory, injunctive and monetary relief. Essentially, plaintiff alleges that the District's decision to raise the ground rent for a lot at Atwood Lake leased by plaintiff is an arbitrary, capricious, and unreasonable exercise of authority, and therefore violative of 42 U.S.C. §1983.

In support of its motion, the District has submitted factual materials which have not been controverted by

plaintiff. Said materials, when read together with the complaint, reveal the following factual setting:

On September 1, 1962, plaintiff entered an agreement with the District leasing a certain lot for one year. In addition to other terms, said agreement provided that plaintiff could renew said lease for fourteen consecutive years. It further provided at the end of said period, plaintiff had the "first preferential right and option" to enter a new lease agreement; the District retained the right, however, to revise rentals, terms, and other conditions if it was deemed necessary. Plaintiff was required by this agreement to pay $110 per year for the first seven years as ground rent. Thereafter said rent was periodically raised until it reached $131 per year.

Plaintiff renewed the lease for each of the fourteen years. During said time period, she constructed a cottage or dwelling costing more than two thousand dollars on said lot and effected other improvements. When the fourteenth year expired on September 1, 1976, the District sought to raise the ground rent to $295 per year. If plaintiff does not agree to this term, she has thirty days to remove her building from the lot or it reverts to the District; even then, plaintiff may be liable for the costs of removing said structure. Plaintiff argues that the subject revision of rent is not fair and reasonable and therefore is violative of her constitutional rights.

A political subdivision of a state is not a "person" within the meaning of §1983. See *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473 (1961); *City of Kenosha v. Bruno,* 412 U.S. 507, 93 S.Ct. 2222 (1973). Cf. *Bishop v. Wood,* ..... U.S. ....., 96 S.Ct. 2074, n.1 (1976); *Hanna v. Drobnick,* 514 F.2d 393 (6th Cir. 1975); *Vick v. Texas Employment Commission,* 514 F.2d 734 (5th Cir. 1975). As plaintiff concedes that the District is a political subdivision of the State

of Ohio, it is apparent to the Court that it lacks jurisdiction of this action.

Plaintiff seeks to avoid this conclusion by characterizing the District as performing "proprietary" as opposed to "governmental" functions. While such an argument may be relevant to sovereign immunity issues, it has no bearing here. Congress' intent in restricting §1983 claims to "persons" was to exclude from liability the "mere instrumentality for the administration of state law." *Monroe v. Pape,* 365 U.S. at 190, 81 S.Ct. at 485-6, quoting from Cong. Globe, 42nd Cong., 1st Session 804. As it is clear that both proprietary and governmental functions are proper subjects of state law, the Court perceives no valid cause to develop such a distinction herein.

As additional and alternative grounds, the Court concludes that, apart from this deficiency, plaintiff has failed to assert a claim cognizable in a federal court. Though not so denominated, it is clear that plaintiff rests her case upon a presumed denial of due process.

Due process guarantees protect only property rights or liberty interests. Cf. *Bishop v. Wood, supra.* Analysis of plaintiff's claims for the purpose of identifying either such interests has convinced the Court that they are lacking.

Plaintiff clearly has the first preferential right to enter a new lease with the defendant. This right arises from the original agreement, and is expressly conditioned upon the district's right to adjust the ground rent. While such an option right might arguably qualify as a property right, there is no claim that it is being denied plaintiff. Rather, it is clear that the District has offered plaintiff the first opportunity to enter into a new agreement for said lot. As plaintiff has not alleged that the District has established a proposal which is so patently beyond her means as to

effectively preclude her exercise of said option, the Court can only conclude that plaintiff is not asserting a deprivation of her option right.

Plaintiff also claims that the assertedly unreasonable increase in ground rent demanded by the District creates a risk of forfeiture of her real and personal property rights. Plaintiff is apparently referring to the possible loss of her cottage and its contents should she fail both to accept the District's proposal and to remove said property within the requisite period of time. Essentially then, plaintiff is asserting that she is, by economic necessity, being compelled to accept defendant's unreasonable actions. Yet the difficult economic choice confronting plaintiff results solely from the terms of the agreement previously executed by her. This Court will not presume that the specific terms thereof regarding removal of property are per se unreasonable. Thus, plaintiff has viable economic alternatives and it may not fairly be said that the District is depriving her of her cottage and her personal property. Careful analysis reveals that plaintiff's primary claim is that her freedom of choosing between economic alternatives is being unreasonably impaired. While Ohio law provides contractual and/or tortious remedies for such an impairment, it does not guarantee freedom from economic coercion. Such limited protection does not grant plaintiff a property right or liberty interest protected by the Fourteenth Amendment. Cf. *Paul v. Davis,* ..... U.S. ....., 96 S.Ct. 1155, 1166 (1976); *Bishop v. Wood, supra.*

Stated differently, plaintiff's claims arise under state law and are essentially for an alleged breach of contract. As recently stated by the Sixth Circuit Court of Appeals:

> "Section 1983 was never intended as a catchall statute under which myriads of suits, traditionally within the exclusive jurisdiction of state courts, may be filed

> in the federal courts in the absence of a showing of deprivation of a constitutional right." (Footnote omitted). *Ryan v. Aurora City Board of Education,* 540 F.2d 222, 226 (1976).

As the Court has found that no constitutionally protected right or interest is involved in this lawsuit, it must conclude that plaintiff's only forum for her complaint is in state court.

Accordingly, defendant's motion to dismiss must be, and the same hereby is, granted.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

JUDGMENT ENTRY OF THE DISTRICT COURT

(Filed November 30, 1976)

Civil Action C 76-300 A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGIENA N. COOK,
Plaintiff,

v.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Defendant.

JUDGMENT ENTRY

The Court having granted defendant's motion to dismiss,

IT IS ORDERED, ADJUDGED and DECREED that this action is hereby dismissed.

/s/ LEROY J. CONTIE, JR.
U.S. District Judge

(REINSTATED) ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 19, 1977)

No. 77-3059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGIENA N. COOK,
Plaintiff-Appellant,

v.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Defendant-Appellee.

ORDER

Before: EDWARDS, CELEBREZZE and PECK, *Circuit Judges.*

This action was filed by Plaintiff-Appellant, in the United States District Court for the Northern District of Ohio, Eastern Division, against Defendant-Appellee for declaratory, injunctive and monetary relief. In its complaint Appellant alleged jurisdiction under 28 U.S.C. 1343 and further alleged that a claim existed under 42 U.S.C. 1983 because of Appellee's action in increasing the rent as a condition of renewal of an expired lease was an unconstitutional exercise of authority by Appellee.

Appellee is a political subdivision of the State of Ohio, and is the fee simple owner of the land in question. The lease entered into was for a term of one year beginning September 1, 1962, for a rental of $110. per year, the lease also provided for a year to year renewal for a period

of fourteen years; by periodic increases Appellant was paying $131. per year for the fourteenth year of the lease. The lease expired on September 1, 1976, fourteen years from commencement. Appellee tendered a proposed new lease agreement for an additional fourteen year period for an annual rental of $294. Appellant refused to execute a new lease and filed suit in the Federal District Court under 42 U.S.C. 1983, alleging an unconstitutional exercise of authority by Appellee. During the pendency of this action Appellant accepted the terms of the new lease.

The District Court granted Appellee's motion to dismiss for lack of jurisdiction, in addition that Appellant's claim did not constitute a claim for relief recognizable under 42 U.S.C. 1983.

Upon due consideration of the record on appeal, the briefs and oral argument of counsel we find this appeal to be completely frivolous, Accordingly,

It is ordered that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 27, 1978)

No. 77-3059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGIENA N. COOK,
Plaintiff-Appellant,

v.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Defendant-Appellee.

ORDER

Before: EDWARDS and CELEBREZZE, *Circuit Judges*, and PECK, *Senior Circuit Judge.*

In an order dated December 19, 1977, this court affirmed the judgment of the district court dismissing plaintiff's complaint. Plaintiff petitioned the Supreme Court for a writ of certiorari and the Supreme Court, in response thereto, vacated the judgment of this court and remanded the cause to this court "for further consideration in light of *Monnell v. Department of Social Services of New York City*, 436 U.S. ..... (1978)." ..... U.S. ..... 1978, 47 U.S.L.W. 3220.

The district court dismissed the complaint on the grounds that the defendant was not a "person" in terms of 42 U.S.C. § 1983 and that the complaint did not state a claim for relief under § 1983. Our affirmance found the "appeal to be completely frivolous."

While Monnell now casts some doubt upon the district court's holding that defendant was not a "person" in terms of § 1983, it has no effect on whether or not the complaint stated a claim for relief under § 1983. We are of the opinion, as we previously held, that plaintiff's assertions in that regard are completely frivolous.

It is therefore ordered that the judgment of the district court be, and it hereby is affirmed; and the prior judgment of this court is hereby reinstated.

Costs taxed to plaintiff.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

(Filed January 2, 1979)

No. 77-3059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGIENA N. COOK,
Plaintiff-Appellant,

v.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Defendant-Appellee.

ORDER

Before: EDWARDS and CELEBREZZE, *Circuit Judges*, and PECK, *Senior Circuit Judge.*

Appellant filed a petition for rehearing with a request for rehearing en banc. No judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

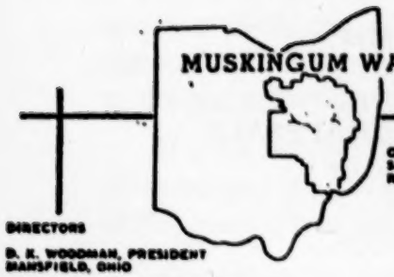
Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

A12

EXHIBIT 1



MUSKINGUM WATERSHED CONSERVANCY DISTRICT

NEW PHILADELPHIA, OHIO 44663

1319 THIRD STREET, N.W., P.O. BOX 349 — (216) 343-6647

GENERAL MANAGER & SECRETARY-TREASURER
RAYMOND E. EICHEL

CHIEF ENGINEER
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CHIEF COUNSEL
SMITH, RENNER, HARSHART, MILLER & KYLER

DIRECTORS

D. K. WOODMAN, PRESIDENT
MANSFIELD, OHIO

ROBERT W. FORKER, VICE PRESIDENT
ZANESVILLE, OHIO

ARTHUR L. CHRISTENSON
CANTON, OHIO

August 27, 1976

Mrs. Georgiana N. Cook
2998 Silver View Dr.
Silver Lake, OH, 44224

Dear Mrs. Cook:

As you no doubt realize, your lease on lot A-431 at Atwood Lake expires September 1, 1976. The District reviewed all of the rental rates during 1974, and directed that adjustments be made on all leases entered into or renewed after January 1, 1975. The adjustments reflect increased values within cottage site areas and additional District operating costs. It was determined that these new adjustments were essential to maintain established standards.

The Board of Directors has authorized renewal of this lease at an annual rental of $294.00. This amount will be changed each year in strict accordance with the BLS Cost of Living Index as provided in paragraph (3) of section III of your lease. Please read your lease thoroughly.

Will you please sign both copies where indicated, being sure to have two witnesses sign opposite, and return them to me by September 8 along with your check in the amount of $294.00 to cover the first year's rental under the new lease.

Sincerely,

William R Lebold

William R. Lebold, Manager
Land Department

WRL:mh
Encs.

Supreme Court, U. S.
FILED
APR 3 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-1367

GEORGIENA N. COOK,
Petitioner,

vs.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Respondent is a political subdivision of the State of Ohio, organized as a Conservancy District pursuant to Ohio statutes. Respondent is the fee simple owner of a parcel of land in Carroll County, Ohio, that it leased to Petitioner on August 30, 1962.

Respondent was under no requirement to lease this parcel of land to Petitioner.

The lease provided that the lease was for a term of one year beginning September 1, 1962, except that the lessee may renew the lease from year to year until a date fourteen years from the beginning of the lease. In addition, the lease states:

> ". . . and the lessee shall have the first preferential right and option to enter into a new lease agreement at the expiration of the 14-year period, which new

lease shall be similar in nature and form, *but with such revision of rentals, terms and other conditions as the Board may deem necessary . . .*" (emphasis added)

The rental for the first seven years of the lease was $110 per year, from September 1, 1962 to August 31, 1969. In accordance with the lease, the Respondent, beginning in the eighth year of the lease, gradually increased the annual rental each year during the remaining seven years of the lease from $110 to $131 for the fourteenth year of the lease.

The lease expired on September 1, 1976. Before the expiration of the lease, the Respondent, in compliance with the provision of the lease relative to the first preferential right and option, tendered to Petitioner a proposed new lease agreement for an additional fourteen years with an annual rental of $294. Petitioner refused to execute a new lease on such terms and filed suit against the Respondent.

Petitioner's suit in the United States District Court for the Northern District of Ohio, Eastern Division filed on September 24, 1976, alleged that the District Court had jurisdiction under 28 U.S.C. Sec. 1343, and that a claim under 42 U.S.C. Sec. 1983 existed because the Respondent's act of increasing the rent as a condition to renewal of an expired lease contract with Respondent was an unconstitutional exercise of authority by Respondent.

The Respondent filed on October 15, 1976, a "Motion to Dismiss Complaint" pursuant to Civil Rule 12 (b) (1), (2) and (6), upon the grounds of (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, and (3) failure to state a claim upon which relief can be granted. Essentially the Respondent argued that the Complaint did not allege facts sufficient to give the

District Court jurisdiction over the subject matter of the Complaint or over the person of the Respondent, and that the Complaint did not state a claim pursuant to the federal statute under which Petitioner brought her action.

The District Court granted, on November 30, 1976, the Respondent's Motion to Dismiss. The District Court held that the Court lacked jurisdiction of the Complaint because the Respondent, as a political subdivision of the State of Ohio, was not a "person" within the meaning of 42 U.S.C. Sec. 1983. In addition, the District Court held that Petitioner's claim did not constitute a claim for relief recognizable under 42 U.S.C. Sec. 1983.

Petitioner appealed this decision to the United States Court of Appeals for the Sixth Circuit. During the pendency of the appeal Petitioner accepted the terms of the new lease by executing said lease.

The Court of Appeals unanimously affirmed the District Court's judgment and stated that "we find this appeal to be completely frivolous."

Petitioner's petition to the Court of Appeals for rehearing was denied.

Petitioner filed with this Court a Petition for Writ of Certiorari in May of 1978 in Case No. 77-1599. This Court, on October 2, 1978, vacated the judgment of the Court of Appeals and remanded the case to that court "for further consideration in light of *Monell v. Department of Social Services of New York City*, 436 U.S. 658 (1978)."

The Sixth Circuit Court of Appeals on November 27, 1978, with the remanded case again affirmed the judgment of the District Court.

Petitioner's petition to the Court of Appeals for rehearing was denied on January 2, 1979.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The District Court and the Court of Appeals Were Correct in Dismissing the Complaint for Lack of Subject Matter Jurisdiction and for Failure to State a Federal Claim for Relief Because the Complaint Alleged No Claim Under 42 U.S.C. Sec. 1983.

The opinion of the District Court clearly states that the Respondent's Motion to Dismiss was granted for two separate and independent reasons—(1) Respondent was not a "person" within the meaning of 42 U.S.C. Section 1983, and (2) "no constitutionally protected right or interest is involved in this lawsuit", and there was therefore no cognizable claim for relief under 42 U.S.C. Section 1983. As the Court of Appeals stated, in its Order on remand, while *Monell* may cast some doubt upon the District Court's holding relative to whether Respondent was a "person" in terms of 42 U.S.C. Section 1983, *Monell* has no effect on whether or not the Complaint asserted a cognizable claim for relief under that statute. The Court of Appeals repeated its prior opinion that Petitioner's "assertions in that regard are completely frivolous."

Petitioner's contention that the action of the Respondent was equivalent to a taking of property without just compensation is without support. The present case does not present a situation in which a governmental body is attempting to exercise its sovereign powers by appropriating land owned by a private party. The Respondent was not required to lease land to the Petitioner or anyone else in 1962 nor was it required to offer a lease containing a provision for a first option for a renewal after

fourteen years. The original lease obligated the Respondent to lease the land to Petitioner for fourteen years and to afford her the "first preferential right and option" to enter into a new lease after the first fourteen years with the rentals, terms, and other conditions of the new lease as the Respondent "deemed necessary" (quoting lease). The Respondent fulfilled its contractual obligation by presenting to her a proposed new lease, which she initially rejected (although she subsequently did execute the new proposed lease). Whatever "rights" Petitioner may have once possessed were common law contractual "rights", and those "rights" were terminated when the lease term expired on September 1, 1976, except for the provision that Petitioner had the first option to enter into a new lease on terms that the Respondent deemed necessary.

Petitioner also contends that the Respondent deprived her of a "right, privilege, or immunity secured by the Constitution and laws." 42 U.S.C. Sec. 1983. Petitioner alleges that the due process clause of the Fourteenth Amendment to the United States Constitution was violated. To be successful on a Sec. 1983 claim based on a deprivation of due process, the Petitioner must show that the Respondent deprived her of "life, liberty, or property without due process of law." Petitioner focuses on an alleged denial of *property* without due process of law, and states that she had a property right under Ohio law that was denied by Respondent.

Petitioner cites no Ohio law affording any party the right to lease land on terms other than those to which the lessor agrees.

There must be a property right under state law before deprivation of same could constitute a violation of Sec. 1983. *Paul v. Davis*, 424 U.S. 693 (1976).

Ohio law does not afford to Petitioner any legal guarantee that she may renew a lease with another party, whether private or government, on rental terms other than those to which the lessor agrees. Unlike the party in *Paul v. Davis, supra*, who did have a state claim for damages of reputation, Petitioner would not even have a state claim inasmuch as there is no Ohio law affording one party to a contract the right to circumvent the contract merely because she disagrees with its terms, especially considering that petitioner previously agreed by contract that any renewal would be conditional upon the right of the lessor to revise the rental terms of the new lease.

Petitioner has cited no case that recognizes a constitutional right similar to the one she claims. Her theory of jurisdiction, if accepted by this Court, would necessarily mean that any person having a contract (lease or otherwise) with a state governmental entity, which contract has expired by its own terms, and who is not satisfied with the terms of a proposed new contract will have access to the federal courts to litigate what the terms of a new contract shall be.

2. The Court of Appeals Was Correct in Affirming the Dismissal of the Complaint Because Petitioner During the Pendency of the Appeal Accepted the Terms of the New Lease.

From the Order of the District Court dismissing the Complaint, Petitioner filed a Notice of Appeal on December 3, 1976. On December 15, 1976, Petitioner did execute the renewal lease containing the provision of $294 annual rental, and Petitioner paid by check the first year's rental of $294. Petitioner thereby contractually agreed to the rent that she had previously sought to have declared unconstitutional by the District Court. Therefore, the appeal is moot because no controversy now exists between the parties.

CONCLUSION

Both the District Court and the Court of Appeals for the Sixth Circuit correctly determined that Petitioner's Complaint should be dismissed. Therefore, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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